

# Regulatory Hotline

October 09, 2015

## SUPREME COURT: PETROLEUM REGULATORY BOARD HAS LIMITED TARIFF REGULATING POWERS

Supreme Court holds:

- Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008, *ultra vires* the parent statute.
- rule-making power of Petroleum Regulatory Board is limited to matters set out in the parent statute and it does not extend to the power to regulate the maximum retail price at which CNG is to be sold to consumers when transported on own network.
- Petroleum Regulatory Board does not have the power to regulate determination of network tariff for city or local gas distribution network and compression charge for CNG when transported on own network.

### BACKGROUND

In an important ruling on the powers of the Petroleum and Natural Gas Regulatory Board ("**Regulatory Board**"), Supreme Court of India ("**Supreme Court**")<sup>1</sup>, held that the Regulatory Board was not empowered to fix or regulate the maximum retail price at which compressed natural gas (CNG) was to be sold to the consumers. The Delhi High Court ("**High Court**") ruled that the Petroleum and Natural Gas Regulatory Board Act, 2008 ("**PNG Act**") did not empower the Regulatory Board to regulate transactions between entities under the PNG Act ("**Respondents**") and consumers. While the High Court acknowledged the power of the Regulatory Board to foster fair trade and competition, however, it held that these provisions did not empower the Regulatory Board to regulate tariff for entities selling CNG to consumers through its own distribution network. High Court also held that the Regulatory Board did not have the power to fix maximum retail price at which gas was to be sold to consumers.

Supreme Court's judgment ("**SC Ruling**") has relied on the well-established principles of rule-making powers of statutory bodies. Unless there is a legislative amendment to negate the SC Ruling, the regulations of the Regulatory Board will have minimal effect on tariff control by entities such as the Respondents. It is important to note that even Union of India substantially supported Respondents and this will have a salutary effect on regulatory environment in the oil and gas sector.

### FACTS

In 2008 the Regulatory Board in exercise of powers under section 22 of PNG Act passed the Petroleum and Natural Gas Regulatory Board (Determination of Network Tariff for City or Local Natural Gas Distribution Networks and Compression Charge for CNG) Regulations, 2008, ("**Tariff Regulations**") which sought to regulate the tariff imposed by Respondents on consumers. It is important to note in the present case Regulatory Board sought to regulate tariff for transportation on Respondents' own network. On April 9, 2012, the Regulatory Board passed an order in exercise of its powers under the PNG Act and the Tariff Regulations ("**Tariff Order**") determining the tariff that Respondents could charge its consumers. The Tariff Order further provided that it would be applicable from April 2008 and modalities of refund would be determined later. Aggrieved by the Tariff Order, Respondents preferred a writ petition under Article 226 of the Constitution of India, 1950, before the High Court.

The High Court held that the Regulatory Board was not empowered to fix any component of network tariff or compression charge for an entity having its own distribution network. The High Court further held that the provisions of the Tariff Regulations could not empower the Regulatory Board to fix the tariff and accordingly the Tariff Order to the extent of fixing the maximum retail price or requiring the Respondents to disclose the entire tariff and the compression charges to its consumers, was not in consonance with the PNG Act.

The Regulatory Board appealed against the judgment of the High Court in the Supreme Court.

### CONTENTIONS OF PARTIES

#### Regulatory Board:

- There was a presumption of validity of subordinate legislation, and as long as the PNG Act enabled the framing of Tariff Regulations for common carrier, contract carrier and city or local natural gas distribution network<sup>2</sup>, the Tariff Regulations were valid.
- The omission of 'city network' in section 11(e)(ii) was accidental, and if the provisions of the PNG Act were read as a whole, the power of the Regulatory Board was sufficiently wide for determining the transportation rate/transportation tariff. Regulatory Board also contended that the Supreme Court should adopt a purposive construction of the PNG Act and Tariff Regulations, regard being had to the broad powers of the Regulatory Board

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and the objectives of the PNG Act.

- Regulatory Board relied on various provisions to contend that transportation tariff was to be regulated irrespective of the nature of the carrier.<sup>3</sup> Relying on the same provisions, Regulatory Board also contended that it was sufficiently empowered under the PNG Act to regulate tariff for transactions between Respondents and consumers.
- As per the scheme of the PNG Act, transportation rate was to be determined even for city networks.<sup>4</sup>
- Section 20(4) empowered the Regulatory Board to provide for exclusivity for city or local gas distribution networks. A duty was cast on the Regulatory Board under section 20(5) of the PNG Act to be guided by various objectives, including fostering competition.

#### Respondents:

- Regulatory Board did not have power to regulate transactions between distribution companies (such as Respondents) and consumers. The power to regulate was triggered only on expiry of period of exclusivity.<sup>5</sup>
- Section 11(a) and section 11(e) of the PNG Act empowered the Regulatory Board to regulate access to access to networks and not for transportation rates. The provisions of section 2(j) and section 2(m) relied by the Regulatory Board were not triggered since conditions set out in these provisions were not complied with.
- The power to regulate transportation rates was not expressly provided in the PNG Act and it was deliberately excluded by Parliament. Hence, it could not be presumed by a court that there was an accidental omission by the legislature.

#### Union of India:

Union of India broadly supported contentions of Respondents. It contended that the legislative intent of the PNG Act did not contemplate conferring tariff making power on the Regulatory Board. The PNG Act did seek to ensure that operators did not create entry barriers and resort to anti-competitive practices. Union of India emphasized that PNG Act sought to ensure supply of gas to consumers on a non-discriminatory basis.

#### SC RULING

Supreme Court declared the Tariff Regulations *ultra vires* the PNG Act and concluded that the Regulatory Board could not frame a regulation for determination of network tariff for city or local gas distribution network and compression charge for CNG. Supreme Court's conclusion was primarily based on the following reasoning:

- There was a noticeable difference<sup>6</sup> between common carrier pipeline and contract carrier pipeline and "a city of local natural gas distribution network". Section 11(e) (ii) only conferred power on the Regulatory Board to determine transport rates for common carrier or contract carrier.
- The entities which were not "common carriers" or "contract carriers" have deliberately not been included under section 11 of the PNG Act by the legislature and the non-inclusion was did not lead to any absurdity. It was also not permissible for the Supreme Court to read into a statute, words and expressions which were not there.
- Consequently, when the Regulatory Board was not empowered under the PNG Act, it was not possible for it to regulate tariff, particularly when a carrier was transporting gas in its own network.

#### ANALYSIS

The SC Ruling balances powers of the Regulatory Board with fundamental principles of administrative law.

Delegating powers of formulating tariff to quasi-judicial bodies is a constitutionally well-accepted practice. The

Electricity Act, 2003, expressly provides for such powers.<sup>7</sup> In *West Bengal Electricity Regulatory Commission v.*

*C.E.S.C. Ltd. etc.*,<sup>8</sup> Supreme Court held that the Electricity Regulatory Commissions Act, 1998, clearly conferred tariff making powers on State Regulatory Commissions. Supreme Court similarly upheld tariff regulating powers in the context of information and broadcasting and telecom as well. In *Hotels and Restaurants Association & Anr. v. Star India Pvt. Ltd.*,<sup>9</sup> Supreme Court upheld tariff regulating powers of the Telecom Regulatory Authority of India. A similar principle was upheld in *Bharat Sanchar Nigam Limited v. Telecom Regulatory Authority of India & Ors.*<sup>10</sup> as well.

What makes the present case unique is the stand of Union of India by resisting need for further regulations. Union of India supported the stand of the Respondents and was able to satisfy the Supreme Court that interests of consumers were sufficiently safeguarded in the PNG Act and there was no need for regulation of tariff between the distributor and consumer.

India imports nearly 75% of its domestic requirements and therefore while monitoring the market is important, if the oil and gas companies are not given the autonomy to fix the tariff, it might dissuade them from investing in this sector. The approach of Union of India is indeed a heartening sign and should help to seek more investments and project a business-friendly image.

— Alipak Banerjee, M.S. Ananth & Pratibha Jain

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<sup>1</sup> Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited & Ors Civil Appeal No.4910 of 2015.

<sup>2</sup> Section 2(zn), 22(1), 61(2)(e), 61(2)(t) of the PNG Act was referred and it was argued that the same empower the Regulatory Board to frame Regulations.

<sup>3</sup> Section 21(1) of the PNG Act.

<sup>4</sup> Sections 2(zn), 22(1), 61(2)(e) and 61(2)(t) of the PNG Act.

<sup>5</sup> Section 20 (4) read with sections 20, 21 and 22.

<sup>6</sup> The definitions of the common carrier and contract carrier refer to pipelines for transportation of petroleum or petroleum products and natural gas by more than one entity. The definition "city or local gas distribution network" means an interconnected network of gas pipelines and the associated equipment used for transporting natural gas from a bulk supply high pressure transmission main to the medium pressure distribution grid and subsequently to the service pipes supplying natural gas to domestic, industrial or commercial premises and CNG stations situated in a specified geographical area.

<sup>7</sup> Section 61, 62 and 178(2) of the Electricity Act, 2003.

<sup>8</sup> AIR 2002 SC 3588.

<sup>9</sup> (2006) 13 SCC 753.

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